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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ANTHONY HASWELL,

Appellant,

vs.

PAUL POWELL, Secretary of State, Illinois,

Appellee.

On Appeal From The Supreme Court Of The State Of Illinois.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, Anthony Haswell, appeals from the final judgment and decree of the Supreme Court of Illinois, affirming the judgment of the Circuit Court of Cook County, Illinois, which sustained the action of the Illinois Secretary of State in suspending appellant's right to drive. Appellant submits this Statement to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 38 Ill. 2d 161, 230 N.E.2d 178 (1967).

JURISDICTION

This action was brought to contest the constitutionality of Section 6-206 of the Illinois Motor Vehicle Law (Ill. Rev. Stat., 1965, Ch. 95½, § 6-206) which authorizes the Secretary of State to suspend or revoke the license of any person who "has been convicted of not less than 3 offenses against traffic regulations governing the movement of vehicles committed within any 12 month period *so as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways.*" (Emphasis added.) Appellant asserted his basic constitutional claims at all stages of the proceeding.

The opinion and final judgment of the Supreme Court of Illinois upholding the statute was entered on September 29, 1967. Appellant filed his Notice of Appeal in that court on December 26, 1967. On December 28, 1967, Mr. Justice Fortas granted an extension of time for the docketing of this action until January 27, 1968.

The jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Illinois by direct appeal is conferred by 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 499 (1952); *Winters* v. *New York*, 333 U.S. 507, 509 (1948); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 452-53 (1939).

STATUTES INVOLVED

The United States Constitution, Amendment XIV, provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Section 6-206 of the Illinois Motor Vehicle Law (Ill. Rev. Stat., 1965, ch. 95½, § 6-206), the constitutionality of which is here challenged, provides in pertinent part:

> "Discretionary authority to suspend or revoke license or permit — right to a hearing.
>
> "(a) The Secretary of State is authorized to suspend or revoke the license or permit of any person without preliminary hearing upon a showing by his records or other sufficient evidence that such person:
>
> • • •
>
> "2. Has been convicted of not less than 3 offenses against traffic regulations governing the movement of vehicles committed within any 12 month period *so as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;* . . . (Emphasis added.)
>
> • • •
>
> "(c) 1. Upon suspending or revoking the license or permit of any person as hereinbefore in this Section authorized, the Secretary of State shall immediately notify such person in writing of the order revoking or suspending the license or permit. . . .
>
> "2. At the conclusion of a hearing pursuant to Section 2-117, the Secretary of State shall either rescind or continue an order of revocation or shall substitute an order of suspension therefor; or, good cause appearing therefor, rescind, continue, change or extend his order of suspension."

QUESTIONS PRESENTED

There are two basic questions presented:

1. Is denial of the right to drive a significant limitation of the constitutionally protected right to travel which can only be imposed in accordance with basic standards of due process of law applicable to constitutionally protected liberties?

2. Is denial of the right to drive as a sanction for past conduct the equivalent of criminal punishment which can only be imposed in accordance with the basic due process standards applicable to the imposition of penalties?

If a citizen's right to drive can be revoked or suspended only in conformity with strict due process standards, the following specific questions are presented:

A. Was the suspension of appellant's driving rights under the Illinois statute contrary to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution because the terms of said statute are too vague, indefinite and uncertain and its delegation of power too broad?

B. Was appellant denied due process of law when, under the Illinois statute, he was deprived of his right to drive by an administrative agency, without a viable provision for judicial review of the administrative determination?

C. Was appellant denied due process of law where his liberties were infringed and criminal punishment or its equivalent imposed by an agency acting as both prosecutor and judge?

STATEMENT OF THE CASE

On August 20, 1965, appellant was notified by the Illinois Secretary of State that his driver's license had been suspended. During the twelve-month period ending May 27, 1965, he had been convicted of three traffic offenses: twice on charges of speeding, and once for making a right turn at an intersection where right turns were prohibited.

Operation of the suspension order was enjoined pending the statutory administrative hearing. A hearing was held on September 21, 1965, resulting in a final order of the Secretary of State on November 10, 1965 suspending appellant's driving rights pursuant to § 6-206 of the Illinois Motor Vehicle Law (Ill. Rev. Stat., 1965, ch. 95½, § 6-206). This section delegates to the Secretary of State the authority to invoke such a suspension where he finds a "disrespect for traffic laws and a disregard for the safety of other persons on the highways." Both the hearing officer and the attorney who presented the case for suspension were employees of the Secretary of State's office.

On November 23, 1965 appellant filed a complaint in the Circuit Court of Cook County for administrative review under the Illinois Act. Ill. Rev. Stat., 1965, ch. 110, §§ 264-279. Under Illinois law, the plaintiff in administrative review bears the burden of proving that the action of the administrative agency was contrary to the manifest weight of the evidence. E.g., *Oliver* v. *Civil Service Com'n*, 80 Ill. App.2d 329, 335 (1st Dist. 1967); *Taylor* v. *Civil Service Com'n*, 33 Ill. App.2d 48, 52 (1st Dist. 1961). On December 5, 1966 the Circuit Court affirmed the Secretary's decision. The Supreme Court of Illinois affirmed the order of the Circuit Court on September 29, 1967.

At every stage of the proceedings appellant challenged the constitutionality of Section 6-206 of the Illinois Motor

Vehicle Law upon the grounds set forth herein, among others. The Supreme Court of Illinois specifically recognized that these constitutional claims were properly preserved and that the appeal involved the constitutionality of the Illinois statute. 38 Ill. 2d at 162, 230N.E.2d at 180.

The Supreme Court of Illinois held that the Motor Vehicle statute was valid as a reasonable exercise of the police power, and not void for uncertainty or because of the breadth of its delegation of authority to the administrative agency. Although that Court rejected distinctions urged upon it as to whether driving a motor vehicle was a "right" or "privilege," it upheld the administrative proceedings on the basis of a conclusion that they were "civil", rather than "criminal," and rejected the contention that the sanctions imposed were such as to require the safeguard of a judicial determination or to prohibit the same agency acting both as prosecutor and judge.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

Perhaps more than any other body of law, the motor vehicle laws directly affect the conduct of the average citizen. The sole contact of most persons with courts or administrative bodies is in connection with traffic violations.

Because direct contact with the traffic laws is so widespread, they must be administered upon the basis of precise guidelines. Each year 50,000 to 75,000 drivers in Illinois alone have their licenses suspended or revoked by the Secretary of State. The standards for invoking powers of such magnitude and importance must not be indefinite, arbitrary or haphazard. Nothing engenders a general disrespect for the law as effectively as an uneven or subjec-

tive application of laws which affect the public in their day-to-day activities.

The right to drive is understandably highly valued in today's society. In many cases this right is closely akin to one's basic right to earn a living. Moreover, to deprive a citizen of the right to drive is to deprive him of the most frequently utilized means of exercising his right to travel, a right which this Court has consistently held to be protected by the United States Constitution. E.g., *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Kent* v. *Dulles,* 357 U.S. 116 (1958). Indeed, with respect to many citizens who cannot afford other means of transportation, and with respect to travel to places which are not served by plane, rail or bus, denial of the right to drive amounts to a complete denial of the right to travel.

As demonstrated below, the constitutional questions presented by this case are substantial. We respectfully submit that it is particularly important that this Court seize this rare opportunity to consider fully these substantial issues in light of the extraordinarily broad impact of the statute here challenged and others like it upon our citizens and upon their attitude toward laws and law enforcement.

I.

Suspension Or Revocation Of The Right To Drive Is A Substantial Limitation Of The Right To Travel Which Is Guaranteed To All Citizens By The Constitution And Can Only Be Imposed In A Proceeding Which Comports With Basic Standards Of Due Process Of Law.

This Court has frequently held that the right to travel is one of the basic "liberties" guaranteed to all citizens by the United States Constitution and which, therefore, must be afforded the fullest protection of the safeguards

of due process of law. The place of this right in the roster of freedoms guaranteed by the Constitution was eloquently described by this Court in *Kent* v. *Dulles*, 357 U.S. 116, 125-26 (1958):

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Charta. Chafee, Three Human Rights In The Constitution Of 1787 (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See Crandall v. State of Nevada, 6 Wall. 35, 44; Williams v. Fears, 179 U.S. 270, 274; Edwards v. People of State of California, 314 U.S. 160. 'Our nation,' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.' Id., at 197."

The language of *Kent* v. *Dulles* was reaffirmed in *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964), where this Court held that the ". . . freedom of travel is a constitutional liberty closely related to rights of free speech and association. . ." (378 U.S. at 517.)

It is abundantly clear that the revocation or suspension of a citizen's right to drive is a significant infringement upon his right to travel. The due process clause does not come into play only when a right is taken away entirely.

Rather, any significant limitation of a constitutionally protected right must meet due process standards. Thus, in the *Kent* and *Aptheker* cases the denial of a passport was tested by stringent standards of due process, although such denial merely *limited* the right to travel by preventing travel to certain foreign countries. Similarly, in the First Amendment area, due process standards must be met where an attempt is made to *limit* speech or assembly, however narrow the limitation or indirect the means.

A driver's license is in effect a passport to travel within the United States. Over 89% of all inter-city trips in the United States are taken by private automobile.[1] Over 90% of the cities and villages in America can only be reached by road.[2] For many, the loss of driving rights amounts to the loss of their means of earning a living. For the average citizen the loss of his right to drive is a substantially greater infringement on his right to travel than would be the denial of a passport. Thus, while the state may clearly impose such a limitation, it must do so by procedures which comport with basic standards of due process of law.

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[1] Association of American Railroads, Bureau of Railway Economics, Washington, D. C., 1966.

[2] There are approximately 113,717 recognized cities and villages in the United States (Rand McNally & Co., "Cosmopolitan World Atlas", p. 200 (1967 ed.). Of these, approximately 626 are served by commercial airports. (Rand McNally & Co., "Commercial Atlas and Marketing Guide", pp. 20-21 (1966 ed.) and approximately 8,050 have railroad passenger service. (National Railway Publication Co. "The Official Guide of the Railways" pp. 758-979 (1968).)

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II.

Revocation Or Suspension Of The Right To Drive Constitutes A Criminal Penalty, Or Its Equivalent, Which Cannot Be Imposed Without Due Process Of Law.

The suspension or revocation of a driver's license is the most severe penalty which the statutes ordinarily impose for violation of the traffic laws. In Illinois the only single traffic offense for which revocation or suspension can be imposed is driving while intoxicated.* Most citizens would rather pay a substantial fine than lose their right to drive.

In light of these obvious facts, state courts have recognized that the revocation or suspension of a driver's license is criminal punishment (*Levin* v. *Carpenter*, 332 S.W. 2d 862, 865 (Mo. 1960)) which can only be imposed in a proceeding which comports with strict standards of due process of law. *Brown* v. *Kelly*, 169 N.Y.S. 2d 209 (App. Div. 1957).

It is immaterial whether the proceeding in which appellant was denied his right to drive is deemed a criminal proceeding or a civil proceeding. To label the proceeding "civil", as the Illinois Supreme Court did in attempting to skirt the due process issues, is to beg the question. This Court has held, on numerous occasions, that sanctions equivalent to punishment must be accorded the procedural safeguards of a criminal prosecution regardless of whether the proceedings are labeled "civil" or "criminal". In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), this Court held that the deprivation of citizenship of draft

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* Revocation is also provided for various felonies which may be related to driving such as murder or negligent homicide with an auto, leaving the scene of an accident involving bodily injury, etc. See Ill. Rev. Stats., 1967, Ch. 95½ § 6-205.

dodgers constituted punishment which could be imposed only in accordance with due process requirements. In *United States* v. *Brown*, 381 U.S. 437 (1965), the disqualification of Communists and ex-Communists from the right to hold office in labor unions was held to be the equivalent of punishment.

In *Specht* v. *Patterson*, 386 U.S. 605 (1967) this Court applied due process standards to a purportedly "civil" commitment under a "Sex Offender's Act" and observed: (386 U.S. at 608):

> "These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxtrom* v. *Herold*, 383 U.S. 107, and to the Due Process Clause."

Because the revocation or suspension of the right to drive is criminal punishment or its equivalent *and* because it limits a constitutionally protected liberty, a proceeding in which revocation or suspension is imposed must meet strict due process standards. As demonstrated below, there is a substantial question as to whether such standards were met in this case.

III.

Section 6-206 Of The Illinois Motor Vehicle Law Is Unconstitutionally Vague And Uncertain And Its Delegation Of Authority Is Unduly Broad.

In principle, any state legislative enactment which is overly vague and uncertain is subject to challenge under the due process clause of the Fourteenth Amendment. The cases recognize, however, that the requirement of precision and certainty is substantially increased where the legislation sanctions the limitation of a constitutional liberty or

the imposition of criminal punishment or its equivalent. As this Court stated in *Aptheker* v. *Secretary of State, supra,* in holding that a statute sanctioning a limitation on the right to travel was unconstitutionally vague (378 U.S. at 514): "... precision must be the touchstone of legislation so affecting basic freedoms." In *Aptheker* the Court adopted, in the area of right to travel, the same strict standards of certainty which it applied to statutes limiting First Amendment rights in *Button* v. *NAACP,* 371 U.S. 415 (1963). See also *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958).

A strict standard has long been applied to any statute which provides for a criminal penalty or its equivalent. In *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939), the Court stated (306 U.S. at 453):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff,* 344 U.S. 174, 176 (1952).

Section 206 of the Illinois Motor Vehicle Law clearly suffers the vice of vagueness and overbreadth which this Court has so frequently condemned.

The Illinois Secretary of State has only the most general and uncertain guidelines for suspending or revoking driving rights. The statute permits the Secretary to deny persons the use of the highways if he finds that a driver has evidenced "a disrespect for traffic laws and a disregard for the safety of other persons on the highway."

These nebulous phrases place unlimited discretionary powers in the Secretary of State. In the present case, for instance, appellant was convicted of making a right turn where such turns were prohibited, an offense which may simply be concerned with the orderly regulation of traffic rather than "the safety of other persons". Under the Illinois statute, the Secretary has absolute discretion to make such decisions and distinctions. He and he alone decides "what persons are included and what acts are prohibited." If he chooses to do so, he may decide that conduct by one person shows "disregard for the safety of others" while identical conduct by another person shows no such disregard. The terms "disregard for the safety of others" and "disrespect for traffic laws" require a subjective evaluation of the state of mind of the violator when he commits an offense. This element of subjectivity makes the statute particularly vulnerable to constitutional challenge. *Hague* v. *CIO*, 307 U.S. 496, 516 (1939); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *Abelson's, Inc.* v. *N. J. State Bd. of Optometrists*, 5 N.J. 412, 75 A.2d 867, 873 (1950).

The Illinois Secretary of State has no rules or regulations implementing the vague standards upon which he can terminate driving rights.[1] The traffic offender thus has no notice of the standards which will govern the revocation or suspension of his right to drive. This inadequacy is, in itself, a basis for voiding the Illinois statute for uncertainty. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939);

[1] The Secretary has adopted a "point system" which guides his determination of the length of a suspension once imposed, but which plays no part in deciding whether to suspend.

Winters v. *New York,* 333 U.S. 507, 514-15 (1948); *Connally* v. *General Construction Company,* 269 U.S. 385, 391 (1926).

The Illinois statute is not unique. Similar statutes have been judged unconstitutionally vague by state courts. In *People* v. *Firth,* 3 N.Y. 2d 472 (1957), 168 N.Y.S. 2d 949, the New York Court of Appeals voided a law prohibiting the operation of motor vehicles "at such a speed as to endanger the life, limb, or property of any person." The court stated that the statute was "too vague and indefinite to constitute a sufficient definition of criminal conduct and that it contains no sufficient standard by which a driver's conduct may be tested. One could go further and say that the statutory verbiage is practically meaningless." (3 N.Y.2d at 474, 168 NYS 2d at 950.) The revocation of a driver's license by the New York Commissioner of Motor Vehicles based upon the same statute was invalidated in *Brown* v. *Kelly,* 169 N.Y.S. 2d 209 (App. Div. 1957). The Supreme Court of Idaho invalidated a similar statute prohibiting the operation of motor vehicles "in such a manner as to endanger or be likely to endanger any persons or property." *State* v. *Pigge,* 322 P. 2d 703 (Idaho 1958).

The uncertainty and breadth of the Illinois statute render proceedings under it violative of due process on still another ground. Where, as here, a statute delegates significant regulatory powers to an administrative agency, this Court has frequently recognized that the grant must contain reasonably precise guidelines for the contemplated administrative action. A statute which grants overly-broad authority to an administrative agency is constitutionally defective. *Freedman* v. *Maryland,* 380 U.S. 51, 57 (1965); *Kent* v. *Dulles,* 357 U.S. 116, 129 (1958); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 372-73 (1885).

While the prohibition against an overly broad delegation of authority to an administrative agency is often discussed as part of the void for vagueness doctrine, it is a separate principle intended to avoid the arbitrary implementation of delegated sanctions.

An administrative agency is less qualified than a court to guard basic legal and constitutional rights. Thus it is especially important that a statute granting significant authority to administrative agencies be clear and definite and that it contain adequate guidelines for the administrative action. As demonstrated above, the Illinois statute, far from providing adequate guidelines, grants unbridled discretion to the Secretary of State in limiting the constitutionally protected rights of Illinois citizens and imposing criminal punishment or its equivalent. Such a broad delegation of authority violates the due process clause of the Fourteenth Amendment.

The constitutionality of the Illinois statute and others like it presents a substantial question in an area which affects millions of citizens every year in the exercise of a precious and constitutionally protected liberty.

IV.

Appellant Was Denied Due Process Of Law By The Limitation Of His Constitutional Liberties Without The Protection Of A Judicial Determination.

Under the Illinois statute the Secretary of State has absolute authority to revoke or suspend a citizen's right to drive without the intervention of judicial proceedings. The Secretary is not required to seek affirmance of his decision in court where he would bear the burden of showing justifi-

cation for the limitations imposed upon the citizen's constitutional liberties. Rather, the suspension or revocation is judicially reviewed only if the citizen institutes a costly and time consuming appeal under the Illinois Administrative Review Act, a proceeding in which he bears the burden of proving affirmatively that the Secretary's action was contrary to the manifest weight of the evidence.

Such a procedure is inadequate to satisfy the requirements of due process where constitutionally protected liberties are at stake. This Court has so held in the First Amendment free speech area. In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the Court voided a statute which permitted an administrative body to bar the exhibition of films without any judicial participation until the aggrieved party sought review in the courts. The inadequacy of such a procedure was expressed in *Freedman* as follows (380 U.S. at 58):

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. [Citations omitted.] To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film."

As the Court pointed out in *Freedman*, the business of a censor is to censor, just as the business of a branch of the Illinois Secretary of State's office is to revoke or suspend driver's licenses. As a result, there is danger that an administrative agency will be less responsive than a court to the constitutionally protected rights of the citizen. Moreover, if recourse to the courts is unduly burdensome,

the initial decision of the agency may, in practice, be final. (380 U.S. at 57-58).

In *Freedman,* which involved "prior restraint", the problem was largely one of delay which had a tendency to render court proceedings moot or impractical. The same dangers exist, for different reasons, in the instant case. Here, as in *Freedman,* the burden of initiating judicial review falls upon the citizen, rather than upon the agency which would restrict his rights. Moreover, the prosecution of an appeal under the Administrative Review Act is a difficult and protracted matter requiring the services of a skilled attorney. In short, it is far beyond the means of the ordinary citizen. (The appellant here is an attorney who prepared and prosecuted his own case.) As a result, those on whom the loss of the right to drive may have the most serious consequences are those who are the least able to test the decision of the administrative agency in court.

Equally important is the fact that in administrative review the burden is on the plaintiff to prove that the agency's decision is clearly against the manifest weight of the evidence. To impose such a burden on a citizen whose basic liberties are at stake is clearly contrary to due process. As the Court said in *Freedman* (380 U.S. at 58):

> ". . .we hold that a noncriminal process which required the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. *First, the burden of proving that the film is unprotected expression must rest on the censor.* As we said in *Speiser* v. *Randall,* 357 U.S. 513, 526, 'Where the transcendent value of speech is involved, due process certainly re-

quires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. . . .' " (Emphasis added.)

A substantial constitutional question is raised by the failure of the Illinois statute to provide a viable means of obtaining judicial determination of appellant's rights in an adversary proceeding.

V.

Appellant Was Denied Due Process Of Law By The Suspension Of His Right To Drive In A Proceeding Initiated, Prosecuted And Judged By The Same Agency.

The suspension of appellant's right to drive was initiated by the Secretary of State. Thereafter, a hearing officer appointed by the Secretary conducted the hearing in which the Secretary's order was reviewed. The charges were prosecuted by another employee of the Secretary. Under the circumstances it is hardly surprising that the Secretary's suspension of appellant's right to drive was upheld.

A proceeding in which constitutionally protected liberties or criminal penalties are at stake clearly fails to meet due process standards where the same agency initiates, prosecutes and judges the charges.

In *In re Murchison*, 349 U.S. 133 (1955), this Court held that due process was denied when a Michigan "one-man judge-grand jury" served as the grand jury in a proceeding out of which a contempt charge arose and then presided at the contempt hearing. The Court stated (349 U.S. 136-37):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires

> an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532. . . .
>
> ". . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. . . ."

The lack of fairness in permitting a judicial officer to perform a dual function as accuser and judge is multiplied when such a dual role is assumed by an administrative agency which is even less likely than a court to appreciate the importance of separating its functions in dealing with the accused. As the American Bar Association Committee on Administrative Law stated (59 A.B.A. Rep. 539, 545 (1934)): "When an administrative tribunal is charged with investigation . . . and with the preparation and conduct [through its own attorneys] of the very proceedings on which it sits in judgment . . . it is doing exactly what the experience of the ages has demonstrated to be unwise and, indeed, unworkable."

In rejecting appellant's contention that he was denied due process of law by the dual function which the Illinois Secretary of State assumes in suspending or revoking the right to drive under the Illinois statute, the Illinois Supreme Court relied on *Marcello* v. *Bonds*, 349 U.S. 302 (1955). A majority of the Court there held that due pro-

cess was not violated in a deportation case by the supervision of adjudicating officers by those who initiated the proceeding. The holding in *Marcello,* however, is extremely narrow. The Court there expressly relied upon the existence of long recognized social and political considerations which give Congress broad discretion in immigration matters and a strong legislative history favoring the challenged practice (349 U.S. at 311). In *Marcello,* as the majority noted, a previous holding that such a dual function was not permitted[1] had been met by specific Congressional enactments authorizing the dual function.[2]

Despite the legislative history and the broad discretion which Congress has over immigration, Mr. Justice Black stated, in dissent (349 U.S. at 315, 318):

> "A fair hearing necessarily includes an impartial tribunal. . . . Petitioner's argument is that requiring him to have his case adjudicated by such a subordinate of the prosecutors deprives him of due process. This due process challenge cannot be lightly dismissed. . . .
>
> • • •
>
> "The idea of letting a prosecutor judge the very case he prosecutes or supervises and control the job of the judge before whom his case is presented is wholly inconsistent with our concepts of justice."

No legislative history or other special considerations exempt the proceeding in this case from the clear principle that a proceeding in which the same agency initiates, prose-

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[1] *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950).

[2] Supplemental Appropriation Act, 64 Stat. 1044, 1048 (1950); Immigration Act of 1952, 66 Stat. 209 (1952), 8 U.S.C.A. § 1252.

cutes and judges the charges is contrary to basic concepts of justice and fair trial. Appellant was denied due process of law by the limitation of his constitutionally protected liberties and the imposition of criminal punishment or its equivalent in such a proceeding.

CONCLUSION

This case presents substantial constitutional questions in an area of the law which affects the everyday lives of millions of citizens. For all of the reasons set forth above, probable jurisdiction should be noted and the case set for full hearing.

Respectfully submitted,

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